partners, excluding Viacom, entered into a consent decree with the Attorneys General of forty states to settle concurrent antitrust litigation ("Primestar Decree"). Viacom entered into a separate consent decree with the forty Attorneys General ("Viacom Decree").27/

38. Under the Primestar consent decree, the vertically-integrated owners may enter into exclusive programming distribution deals with one service at each DBS slot -- just like Time Warner and Viacom have done with USSB at 101°. Members of Congress already have expressed their concern to the Commission that they are "troubled" by the effect that this type of exclusivity arrangement may have on Program Access.28/ Their concern is justifiable. Primestar's cable owners will be able to carve up the DBS market to the competitive disadvantage of non-cable owned DBS providers such as NRTC.

39. The Commission itself already is on record as opposing the Primestar consent decree, because it allows the terms of the first high-powered DBS contract to control subsequent contracts at different orbital slots.29/ This approach, in the Commission's view, threatens to prevent or severely distort the

---

27/ Notice, ¶ 85-87.

28/ See, Attachment A hereto, supra.

29/ See, Memorandum of Law of the Federal Communications Commission as Amicus Curiae, State of New York, et al. v. Primestar Partners, L.P., No. 93 Civ. 3868 (JES), August 23, 1993, pp. 18-19.

operation of market forces as permitted by the federal regulatory system. NRTC agrees with this assessment.

40. USSB evidently paid an exclusivity premium for its arrangements with Time Warner and Viacom, thereby setting the baseline price for distribution of HBO, Showtime and their other critical programming in the DBS market. No other DBS provider at 101° can obtain this programming from Time Warner or Viacom at any price. This severely "tilts" the DBS playing field in favor of the vertically-integrated cable programmers and Primestar. It makes DBS less effective as a competing technology, because it allows the cable industry to structure the playing field of its competitors. Through the use of these exclusive arrangements, the vertically-integrated cable industry is controlling DBS as a competitive force.

41. Compounding this Program Access problem, the largest cable MSOs (e.g., Tempo/TCI) eventually will be positioned to provide DBS service from a non-101° orbital location. They will not be subject to the USSB exclusivity arrangement at 101°. Instead, they will be free to obtain access to the Time Warner and Viacom programming while access by NRTC/Hughes remains blocked.

42. The USSB/Time Warner/Viacom exclusivity arrangement places the future of DBS solely in the hands of vertically-integrated cable programmers and USSB.30/ Through these exclusive arrangements, USSB is now "the only deal in town" for DBS distribution of HBO, Showtime and the other "exclusive" programming at 101°. Should USSB opt for a "low volume/high margin" or "no service/high cost" approach to DBS, the development of the entire DBS market will be handicapped.31/ Without competitive offerings, the DBS market cannot reach its full potential as an alternative delivery technology serving the American public.

43. The success of DBS as a competitive technology must not be dependent on the competitive decisions of huge, vertically-integrated cable programmers and one DBS distributor. To the contrary, Congress mandated access to programming for all competing distributors, not just USSB, so that the public would receive the full benefits of real competition, 32/ In order to

---

30/ USSB itself is apparently intertwined with the cable industry. Viacom International has joined with Conus Communications, Inc. ("Conus") to create and distribute the ALL NEWS CHANNEL, a 24 hour news service. Conus and USSB share certain ownership interests.

31/ USSB already appears to have priced HBO and Showtime high for DBS relative to C-Band. USSB offers HBO and Showtime at retail as single DBS services for $10.95 each. Each of these services can be obtained from a number of sources in the C-Band market from between $7.95 to $10.95.

32/ See, Second Ex Parte Presentation by NRTC, MM Docket No. 92-265, March 4, 1994.

develop and thrive as a competing technology, the DBS industry needs serious access to programming, not exclusive arrangements "blessed" by the cable industry.

C. The Commission Must Require the Submission of Comprehensive Annual Reports by Satellite Carriers and Vertically-Integrated Satellite Cable Programming Vendors.

44. The Commission states that it intends to rely on the data submitted in response to the Notice for purposes of preparing its first report to Congress. In the future, however, the Commission expresses an intention to establish more systematic reporting procedures. Commenters are requested to suggest specific studies, surveys, samplings, methodologies, etc. that the Commission might undertake to gather the information that will enable the Commission to prepare accurate and comprehensive reports.

45. NRTC strongly supports the Commission's intention to establish systematic reporting procedures. We believe it is imperative that comprehensive, standardized reporting requirements be adopted. All satellite carriers and vertically-integrated cable programmers should be required to submit aggregate totals of programming sold to the various types of MVPDs.

46. It is essential that the Commission receive information from each satellite carrier and vertically-integrated cable programmer regarding the rates paid by different types of distributors, including penetration and volume discounts. The level of pricing differentials for programming, including the range and average of volume related discounts and other permissible differentials, should be routinely reported to the Commission by the carriers and programmers.

47. All satellite carriers and vertically-integrated cable programmers should be required to provide detailed information regarding any exclusive practices, arrangements or understandings they may have with any MVPD. They must identify the parties and describe the nature and scope of the exclusivity granted. Additionally, they should be required to identify the specific circumstances under which they have refused to make programming available on request to any MVPD.

48. The Commission also should become more actively involved in monitoring the large, vertically-integrated programmers' abusive practices in their negotiations with MVPDs for distribution or carriage rights. The Commission should be notified by the programmer if an MVPD is required to waive its rights to file a complaint at the Commission in return for access to programming. The Commission should know of the nature and scope of overreaching confidentiality agreements mandated by the programmers. Additionally, the Commission should

be aware if a programmer has "grandfathered" its cable rates, or abused the "5% rule" or otherwise exploited the Commission's Program Access requirements.33/

49. NRTC urges the Commission to collect all of this information on an ongoing annual basis (i.e., the Commission should not allow the programmers to submit only a "snapshot" as of a specific date).34/ We urge the Commission to make these materials available for public inspection and comment to the maximum extent possible.

50. To monitor and combat these problems, the Commission should obtain comprehensive annual reports from the programmers; prohibit abusive practices by rule; make it clear that damages will be awarded for Program Access violations; and banish the type of exclusionary arrangements represented by the USSB/Time Warner/Viacom deal.

IV. CONCLUSION

51. As the Commission has recognized, all distributors need access to desirable, reasonably priced programming. Without full and fair access to

---

33/ These types of abusive practices should be prohibited by the Commission.

34/ Regarding the Primestar partners and Viacom, the Commission additionally should require filing at the Commission of all of the information presently required to be filed with the State Attorneys General under the Primestar and Viacom consent decrees. (Notice, ¶¶ 85-87).

programming that appeals to the marketplace, MVPDs cannot compete effectively. Access to programming is essential to the entry and development of competing distribution technologies.

52. In many cases, however, the large, vertically-integrated cable programmers continue to thwart the competitive potential of HSD and DBS, despite the 1992 Cable Act and the Commission's Program Access rules. As a result, full and fair access to C-Band and DBS programming at nondiscriminatory rates is still largely unavailable to rural Americans even at this late date.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Commission to consider these Comments and to proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

B.R. Phillips, III
Chief Executive Officer

By: John B Richards

John B. Richards
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4210

Its Attorneys

Dated: June 29, 1994

Attachment A

BILLY TAUZIN
THIRD DISTRICT, LOUISIANA

ENERGY AND COMMERCE COMMITTEE
MERCHANT MARINE AND FISHERIES COMMITTEE
CHAIRMAN, COAST GUARD AND
NAVIGATION SUBCOMMITTEE

WASHINGTON OFFICE:
TELEPHONE: 202-225-4031
2330 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515

Congress of the United States
House of Representatives
Washington, DC 20515-1803

June 15, 1994

DISTRICT OFFICES:

TELEPHONE: 504-589-2366
501 MAGAZINE STREET
SUITE 1041
NEW ORLEANS, LA 70130

TELEPHONE: 504-876-3033
FEDERAL BUILDING, SUITE 107
HOUMA, LA 70360

TELEPHONE: 318-367-9231
210 EAST MAIN STREET
NEW IBERIA, LA 70560

TELEPHONE: 504-621-8430
ASCENSION PARISH COURTHOUSE EAST
828 SOUTH IRMA BLVD.
GONZALES, LA 70737

The Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Chairman Hundt:

We are writing to ask your help in strengthening the Commission's rulemaking on competition and diversity in video programming distribution.

During the past year a great deal of the energy has necessarily been devoted to the issue of cable rate regulation. Notwithstanding the immediate importance of that issue, many Members of Congress believe that the true answer to improving the video programming distribution marketplace is the promotion of real competition. In the long run we believe that competition -- not regulation -- will achieve the greatest benefits for consumers and result in greater vitality in the industry. Of the many provisions of the Cable Act that are designed to promote competition, none are more important than Section 19, which instructs the Commission to ensure nondiscriminatory access to cable programming by all distributors.

We strongly believe that section 19 is worthy of your serious and immediate attention. We respectfully request that you reexamine the Commission's First Report and Order implementing section 19 in order to eliminate potential loopholes that would permit the denial of programming to any non-cable distributor.

We wish to call to your attention certain disquieting developments heightening our concern about the FCC's program access regulations. We are troubled by the Primestar consent decrees and the effect they may have on program access. We believe the FCC's program access regulations need to be tightened if the full force and effect of Section 19 of the 1992 Cable Act is to be preserved.

As you may be aware, despite the Commission's well-reasoned brief opposing the entry of the state Primestar decree, the court entered final judgment. Among other things, the state consent decree will permit the vertically integrated cable programmers that own Primestar to enter into exclusive contracts with one direct broadcast satellite (DBS) operator to the exclusion of all other DBS providers at each orbital position. On the other hand, Primestar's ability to obtain all of the programming of its cable owners will be unimpeded by the state consent decree. In its opinion, the court made clear, however, that its ruling was in no way a judgment about the propriety of such exclusive contracts under Section 19 of the Cable Act

or the FCC's implementing regulations and specifically left that question open to be decided by the FCC.

In essence, the state consent decree gives Primestar's cable owners the ability to carve up the DBS market to the competitive disadvantage of non-cable owned DBS providers. This is directly contrary to the intent of Congress. In enacting the program access provisions, Congress specifically rejected the existing market structure in which vertically integrated cable companies controlled the distribution of programming. Congress and the FCC recognized that vertically integrated programmers had both the means and the incentives to use their control over program access to discriminate against cables' competitors and to choke off potential competition, even in unserved areas. Moreover, Congress looked to DBS as a primary source of competition to cable, not as a new technology to be captured by the cable industry.

Congress enacted very strong program access provisions and gave the Commission broad authority to regulate against anti-competitive and abusive practices by vertically integrated programmers. Section 628 (b) makes it unlawful for a cable operator or vertically integrated cable programmer "to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor" from providing cable or superstation programming to consumers. Section 628 (c) provides the Commission with the authority to promulgate regulations to effectuate the statutory prohibition and delineates their minimum content.

Upon examination of the program access regulations, we have discovered a critical loophole that seems ripe for exploitation by the cable industry and is directly applicable to exclusive contracts between vertically integrated cable programmers and DBS providers. Section 628 (c) (2) (c) of the 1992 Cable Act contains a broad per se prohibition on "practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest" for distribution in non-cabled areas. However, Section 76.1002 (c) (1) of the Commission's new rules covers only those exclusionary practices involving cable operators.

The Commission's rule in its present form is inconsistent with both the plain language of the statute and Congressional intent. The prohibition against all exclusionary practices by vertically integrated programmers in unserved areas is clear. While it certainly includes exclusive contracts between cable operators and vertically integrated programmers, the language of the statute does not limit the prohibition to that one example. The regulations incorrectly turn the illustrative example into the rule.

This loophole must be closed and the program access regulation strengthened on Reconsideration. The Primestar consent decree alone makes it clear that the bare minimum regulation of exclusive contracts is insufficient to guard against anti-competitive practices by vertically integrated cable programmers. The Commission's final regulations should provide, as does the legislation, that all exclusive practices, understandings, arrangements and activities, including (but not limited to) exclusive contracts between vertically integrated video programmers and any multichannel video programming distributor are per se unlawful in non cabled areas. In cabled areas, all such exclusive contracts should be subject to a public interest test with advanced approval required from the Commission.

There is one other vital point to note regarding the Commission's program access rules. It has become evident that the cable industry has been attempting to manipulate the Commission's reconsideration proceeding to obtain an overly broad Commission declaration as to the general propriety of exclusive contracts with non-cable multichannel video programming distributors. Any such pronouncement by the Commission would eviscerate the program access protections of the 1992 Cable Act.

Specifically, in addition to and independent of the explicit exclusive contracting limitations imposed by the Act, exclusive arrangements between vertically integrated programmers and non-cable multichannel video programming distributors (MVPD) in many circumstances also violate Section 628(b)'s general prohibition of "unfair practices" which hinder significantly or prevent any MVPD from obtaining access to cable programming. In addition, they may violate Section 628 (c)(2)(B)'s prohibition against discrimination by a vertically integrated satellite cable programming vendor in the prices, terms and conditions of sale or delivery of satellite cable programming "among or between cable systems, cable operators, or other multichannel video programming distributors." Accordingly, we urge the Commission to be extremely careful in its decision on reconsideration to avoid any ruling or language which could, in any way, limit the protections against discrimination afforded by Sections 628(b) and (c)(2)(B).

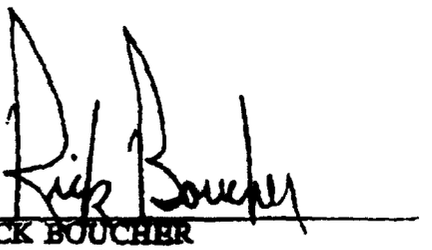
Lastly, Mr. Chairman, it is absolutely essential in overview that the Commission add regulatory "teeth" to its Program Access regulations. In the Program Access decision, the Commission generally declined to award damages as a result of a Program Access violation. Without the threat of damages, however, we see very little incentive for a programmer to comply with the rules. Nor is it practical to expect an aggrieved multichannel video programming distributor to incur the expense and inconvenience of prosecuting a complaint at the Commission without an expectation of an award of damages. There is ample statutory authority for the Commission to order "appropriate remedies" for program access violations, and we urge the Commission to use such authority to impose damages (including attorney fees) in appropriate cases. [See, 47 U.S.C. 548 (e) (i)].

DBS has long been viewed as a strong potential competitor to cable if it were able to obtain programming. In the 1992 Cable Act, Congress acted definitively to remove that barrier to full and fair DBS entry into the multichannel video programming distribution market. We think it is of the utmost importance that there be no loopholes which would allow cable or, in light of recent merger activity, cable-telco combinations to dominate the DBS marketplace.

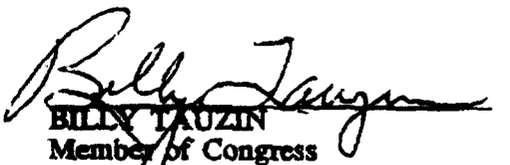
Thank you for your consideration.

Sincerely,

cc: The Hon. James H. Quello
The Hon. Andrew C. Barrett
The Hon. Susan Ness
The Hon. Rachelle B. Chong

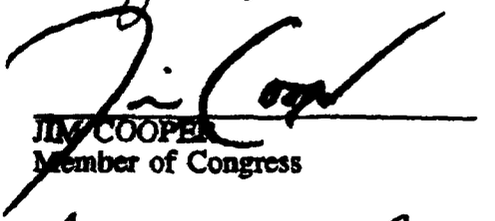


RICK BOUCHER
Member of Congress

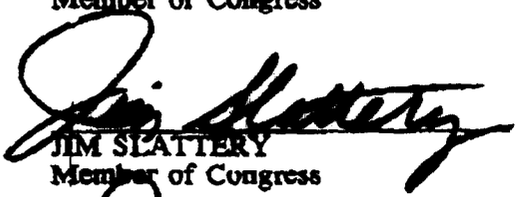


BILLY TAUZIN
Member of Congress

RON WYDEN
Member of Congress

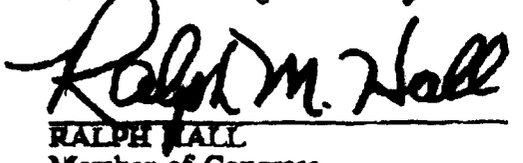


JIM COOPER
Member of Congress

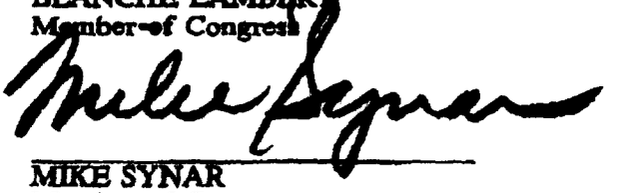


JIM SLATTERY
Member of Congress

BLANCHE LAMBERT
Member of Congress



RALPH HALL
Member of Congress



MIKE SYNAR
Member of Congress